IN THE

Supreme Court of the United States

October Term, 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, a Railroad Labor Organization National in Scope, and JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, individually and on behalf of all members of the plaintiff Railway Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, a corporation, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, a Railroad Labor Organization National in Scope, and ROBERT M. HARKINSON and ARTHUR T. BESWICK, individually and on behalf of all members of the plaintiff Railway Labor Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

BRIEF ON BEHALF OF RESPONDENT BROTHERHOOD OF RAILROAD TRAINMEN

The petitioners seek the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 23, 1953 (R.

68-70),* which affirmed the judgment of the United States District Court for the Southern District of New York dismissing the amended complaint on the ground that the District Court lacked jurisdiction over the subject matter of the amended complaint and, further, that the National Railroad Adjustment Board had exclusive jurisdiction over such subject matter (R. 5-19).

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (R. 68-70) is reported at 205 F. 2d 153. The opinion of the District Court for the Southern District of New York (R. 5-19) is reported at 115 F. Supp. 359.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1) (62 Stat. 928).

Question Presented

The sole question presented by the petition is whether Section 3 of the Railway Labor Act which established the National Railroad Adjustment Board granted to that Board

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* All references, unless otherwise noted, refer to the Transcript of Record in the action involving the respondent Wyer, as Trustee of The Long Island Rail Road Company. The respondent Brotherhood of Railroad Trainmen appears in both actions and will clearly designate references involving the respondent The New York, New Haven and Hartford Railroad Company, where such references are necessary, by specifically referring to the New Haven Transcript of Record.

exclusive jurisdiction to settle disputes between a carrier and its employees arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions and, more specifically, to exercise such jurisdiction to determine a dispute arising under Section 2-Eleventh of the Railway Labor Act affecting union shop agreements.

Statutes Involved

The pertinent provisions of Sections 2 and 3 of the Railway Labor Act (45 U. S. C. A., Sections 152, 153) are printed herein in Appendix A, *infra*, pp. 17-28.

Statement

United Railroad Operating Crafts (hereinafter referred to as UROC) was organized in the State of California in the year 1951. The three respondent national in scope railroad labor organizations were all organized in the 19th century. They are the Brotherhood of Railroad Trainmen (hereinafter referred to as the Trainmen), the Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as the Firemen) and the Brotherhood of Locomotive Engineers (hereinafter referred to as the Engineers). Each of the three respondent Brotherhoods has represented its craft through separate collective bargaining agreements for many years in dealing with the respondent The Long Island Rail Road Company. Subsequent to the enactment of the union shop amendment and on June 20, 1952, the three Brotherhoods supplemented their original agreements

and entered into union shop agreements with the respondent The Long Island Rail Road Company. The three agreements are identical and each one became effective July 1, 1952 (R. 32-49). Each agreement is in accordance with the provisions of Section 2-Eleventh of the Railway Labor Act, as amended in 1951 to authorize union shop agreements, providing in substance that as a condition of continued employment, employees covered by the original basic labor agreement between the Brotherhood and the carrier shall, within 60 days after the effective date of the union shop agreement, become and remain members of the contracting union or if they shall, within the same 60 days, acquire membership in any railway labor organization other than the contracting union "national in scope, organized in accordance with the Railway Labor Act" (R. 33, 39, 45). The 60-day period allowed by the union shop agreements within which time an employee could affiliate himself with one of the national in scope Railroad Brotherhoods ended on August 29, 1952.

On or about September 17, 1952, the respondent The Long Island Rail Road Company notified the individual plaintiff Gallagher that he had been cited by the Brotherhood of Locomotive Firemen and Enginemen for not being in compliance with the Firemen's union shop agreement. The carrier afforded Gallagher a hearing. Gallagher duly demanded a hearing (amended complaint, par. 7B, R. 23) and such hearing was held on October 3, 1952. At the hearing Gallagher asserted that he was in compliance with the union shop agreement in that he had joined UROC on August 26, 1952 (amended complaint, par. 7B, R. 23). The same situation obtained with respect to the individual plaintiff Hunt, an engineer, who claimed he was in compliance

with the union shop agreement because he had joined UROC on August 16, 1952 (amended complaint, par. 8C, R. 24). The individual plaintiffs Carlson and Owens are trainmen and they too received notification that they had been cited for non-compliance with the union shop agreement (amended complaint, par. 9A, R. 25). The carrier never received replies to its registered letters from either Carlson or Owens but both of these men subsequently submitted an affidavit to the District Court, sworn to on December 17, 1952, in which they asserted that each had become a member of UROC during August 1952. The Long Island Rail Road Company reached the determination that none of the individual petitioners had met the requirements of the union shop agreements in that they had not become members of any of the "national in scope" railway labor organizations.

The union shop agreement supplementing the original collective bargaining agreement between the New York, New Haven and Hartford Railroad Company and the Brotherhood of Railroad Trainmen was made on July 20, 1951 and became effective September 1, 1951 (New Haven R. 15-18). This agreement is substantially identical with the agreement in the Long Island case (R. 44-49). The 60 day period, in compliance with the provisions of the union shop amendment, within which time an employee could affiliate himself with one of the national in scope Railroad Brotherhoods ended on October 31, 1951.

On or about September 10, 1952, the respondent The New York, New Haven and Hartford Railroad Company notified the individual plaintiffs Harkinson and Beswick that they had been cited by the Brotherhood of Railroad Trainmen for not being in compliance with the Trainmen's

union shop agreement. The carrier afforded Harkinson and Beswick hearings. Harkinson and Beswick duly demanded hearings (complaint, par. 7 B, New Haven R. 9) and such hearings were held on September 25, 1952. At the hearings Harkinson and Beswick asserted that they were in compliance with the union shop agreement in that they were members only of UROC which they claimed was a railway labor organization "national in scope" (complaint, par. 7 B, New Haven R. 9). The New York, New Haven and Hartford Railroad Company reached the determination that neither Harkinson nor Beswick had met the requirements of the union shop agreement in that they had not become members of any of the "national in scope" railway labor organizations.

The amended complaint in the Long Island case (R. 19-49) and the complaint in the New Haven case (New Haven R. 5-18) both seek to have the petitioner UROC declared a railway labor organization "national in scope" within the meaning of Section 2-Eleventh of the Railway Labor Act.

The respondents' motions to dismiss the amended complaint because of the District Court's lack of jurisdiction of the subject matter of the action (R. 50-52) were granted by the District Court (R. 3-5) and the dismissal of the amended complaint was affirmed by the Court of Appeals for the Second Circuit (R. 71).

The motions to dismiss the amended complaint for lack of jurisdiction over the subject matter of the action were made upon the following grounds; that the Congress had deprived the courts of jurisdiction to decide any issues pertaining to employee grievances against carriers or of the interpretation and application of agreements pertain-

ing to wages, rules and working conditions by enacting Section 3, First (i)-(p) of the Railway Labor Act which established an exclusive procedure before the National Railroad Adjustment Board for the very purpose of deciding any of such grievances or disputes (R. 50); that, in any event, the Congress by enacting Section 3, First (f) of the Railway Labor Act had deprived the courts of jurisdiction to determine whether any railway labor organization was "national in scope" by establishing exclusive procedures before the Secretary of Labor and the National Mediation Board to determine this very question (R. 50-51).

The District Court, in granting the respondents' motions to dismiss the amended complaint, held that the National Railroad Adjustment Board had exclusive jurisdiction over the subject matter of the complaint, citing *Order of Railway Conductors* v. *Pitney*, 326 U. S. 255; *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, and *Order of Railway Conductors* v. *Southern Railway Company*, 339 U. S. 255, thus making it unnecessary to pass upon the second ground of the respondents' motions (R. 5-19). The Court of Appeals for the Second Circuit affirmed, *per curiam*, upon the opinion of the District Court (R. 70).

Long after the entry of the order dismissing the amended complaint in the District Court on April 27, 1953 (R. 3-5) and long after the unanimous affirmance of that order by the Court of Appeals for the Second Circuit on June 23, 1953 (R. 68-71) the petitioners, by motion dated October 27, 1953, moved, in the District Court for the Southern District of New York under Rule 60 (b)(6) of the Federal Rules of Civil Procedure, to vacate the judg-

ment and order of the District Court that had been entered upon the mandate of the Court of Appeals for the Second Circuit and for leave to amend the amended complaint by adding thereto a completely new count which would allege that the Railway Labor Act was unconstitutional in various respects. By this most recent motion the petitioners attempted to completely change their original theory. The fact that the petitioners in attempting to add this entirely new count attacking the constitutionality of the Railway Labor Act are completely inconsistent is of little note since that is their privilege but the attempt to do so points up their lack of purpose. For example, the amended complaint alleges "the legally binding provisions of certain collective bargaining agreements * * * between the Defendant [The Long Island Railroad Company] and the [Brotherhoods]" pursuant to Title 45 U. S. C. A., Section 151, *et seq.** (R. 19-20). Further, the amended complaint alleges the petitioners' reliance upon the provisions of the Railway Labor Act and particularly the union shop amendment, asserting "That the Defendant and said The Long Island Rail Road Company are subject to and are governed by the provisions of said Railway Labor Act, as amended, Title 45 U. S. C., Section 151, *et seq.*, and particularly Section 152-Eleventh thereof" ** (amended complaint par. 3C, R. 21). Finally, the amended complaint not only relies completely upon the constitutionality of the union shop amendment but, indeed, totally embraces it, saying that "the sole question involved in this litigation" is whether or not members of UROC are entitled to employment under the provisions of the union shop amend-

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* The Railway Labor Act.

** Section 152-Eleventh is the union shop amendment.

ment "while maintaining their membership solely in said * * * organization * * *" (R. 27).

The petitioners' most recent motion, pursuant to Rule 60 (b)(6), *supra*, to vacate the judgment and order entered upon the mandate of the Court of Appeals and for leave to amend their amended complaint so as to raise the constitutional question for the first time was denied by the District Court in an opinion dated December 8, 1953* upon which an order was duly entered on December 15, 1953. It is well settled that a plaintiff may not assert a new theory of attack which he could certainly have used in the first instance and which was most assuredly within his knowledge but which he did not choose to assert until after the courts had decided against him. See: *Ackermann* v. *United States*, 340 U. S. 193; *Von Wedel* v. *McGrath*, 100 F. Supp. 434; aff'd *per curiam* 194 F. (2d) 1013; see also *Klapprott* v. *United States*, 335 U. S. 601; *United States* v. *Karahalias*, 205 F. 2d 331. In the instant case the petitioners could have sought leave to raise the constitutional issue by an additional count under Rule 15(a) made after the decision of the District Court on April 16, 1953 and prior to the entry of the order of dismissal on April 27, 1953. They could also have sought such leave under Rule 59 during the ten-day period following the entry of the order. The District Court noted that the petitioners did not seek such leave but rather that they waited six months from the time the order was entered dismissing the amended complaint and four months after the affirmance of such dismissal by the Court of Appeals for the Second Circuit.*

Subsequent to the dismissal of its motion to vacate the judgment and to amend the amended complaint in the in-

* Appendix B, pages 29-31.

stant case, UROC moved in one of the other cases which it has brought in other circuits to amend its complaint so as to include the constitutional count. In the case of *Johns* v. *Baltimore and Ohio Railroad Company,* No. 53 C 1927, in the United States District Court for the Northern District of Illinois, Eastern Division, cited at page 23 of the petition, UROC has now so moved. It brought on its motion before the defendant had answered or moved with respect to the complaint and on December 2, 1953, District Judge La Buy signed an order granting leave to UROC to amend its complaint so as to assert the hereinbefore mentioned grounds of the alleged unconstitutionality of the Railway Labor Act. Pursuant to the provisions of Judge La Buy's order, the Chief Judge of the Court of Appeals for the Seventh Circuit, by virtue of 28 U. S. C. A. Section 2284, has designated a three-judge court to hear the question.

In the case of *Lake, et al.* v. *Baltimore and Ohio Railroad Company,* No. 3049, in the United States District Court for the Southern District of Ohio, cited at page 22 of the petition, the District Court held, as it held here, that the National Railroad Adjustment Board had exclusive jurisdiction. UROC did not raise the constitutional question in the *Lake* case. It has since withdrawn its appeal to the Court of Appeals for the Sixth Circuit from the order dismissing its complaint. UROC's complaint was also dismissed upon the same grounds in *Pigott* v. *Detroit, Toledo and Ironton Railroad Co.,* No. 12130, in the District Court for the Eastern District of Michigan on November 10, 1953.

In *United Railroad Operating Crafts, et al.,* v. *Pennsylvania Railroad Company,* No. 52 C 1465, in the United States District Court for the Northern District of Illinois, cited at page 22 of the petition, a Special Master held that

the District Court had jurisdiction to determine whether or not UROC was "national in scope" and he heard testimony on that issue. The Special Master found that UROC was not "national in scope" and the District Court confirmed his report and dismissed the complaint. UROC has appealed to the Court of Appeals for the Seventh Circuit. Understandably, no cross-appeal has been taken on the jurisdictional question but that issue was raised by the pleadings and may, on appeal, be brought up by the appellee or by the Court of Appeals.

In the case of *United Railroad Operating Crafts, et al.* v. *Northern Pacific Railroad Company,* No. 2976, in the United States District Court for the Western District of Washington, cited at page 22 of the petition, the District Court held that the National Railroad Adjustment Board had exclusive jurisdiction of the subject matter—as was held here—but it attempted to maintain the injunction in effect for a 30-day period during which it directed UROC to present its grievances to the Adjustment Board. On November 6, 1953, the Court of Appeals for the Ninth Circuit upheld the District Court in so far as that court held that exclusive jurisdiction lay with the National Railroad Adjustment Board but reversed the District Court for retaining jurisdiction over the injunction portion of the action. The Court of Appeals for the Ninth Circuit completely dismissed the complaint for all purposes on November 6, 1953 as unofficially reported at 33 LRRM 2146.

It is important to note that when this action was brought by UROC against the Northern Pacific Railroad Company, fully nine months before the present actions were instituted, UROC included in its complaint a separate count attacking the constitutionality of the union shop amendment. The complaint in the *Northern Pacific* case was

filed on January 23, 1952 (the complaints here were filed during the latter part of October, 1952). On January 30, 1952, however, UROC voluntarily withdrew its count attacking the constitutionality of the union shop amendment. It is abundantly clear, therefore, that UROC gave serious consideration to the constitutionality of the union shop amendment fully nine months before the present actions were commenced and that it, for reasons best known to itself, decided not to assert that the amendment was unconstitutional but, indeed, it took a voluntary affirmative step to keep the matter from the court's consideration by withdrawing the count. On November 6, 1953, the Court of Appeals for the Ninth Circuit, as hereinabove noted, directed the dismissal of UROC'S complaint, saying:

> "We conclude that the United States District Courts have not been granted jurisdiction to determine issues of the kind tendered by the complaint filed below. Consequently, the cause is remanded to the District Court with directions to dismiss the cause for lack of jurisdiction." (*UROC* v. *Northern Pacific Railroad Company, supra.*)

Thus it is a fact that in every case brought by UROC all over the country the District Courts have uniformly held* —where decisions have been handed down—that the courts lack jurisdiction of the subject matter of the action and that exclusive jurisdiction lies in the National Railroad Adjustment Board. In every case where a Court of Appeals has reviewed the District Court's decision a direction to dismiss the complaint for lack of jurisdiction has been ordered.

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* Except in the *Pennsylvania* case, *supra*, where a Special Master took testimony and decided as a matter of fact that UROC was not "national in scope" and the District Court dismissed the complaint on the merits.

Reasons for Denying the Writ

1. The question of the constitutionality of the exclusive remedies provided by the Railway Labor Act—although raised by the petitioners here—is not properly before this Court. As hereinbefore noted, the petitioners did not question the constitutionality of the Act below nor did they dispute the proposition that the National Railroad Adjustment Board had exclusive jurisdiction under the holdings of this Court in *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795; and *Order of Railway Conductors of America* v. *Southern Ry. Co.*, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811. Indeed, they impliedly conceded the premise but argued that a union shop agreement does not involve the interpretation of agreements concerning "working conditions" so as to bring it under the jurisdiction of the Adjustment Board within the meaning of the *Pitney* line of cases. The District Court rejected UROC's theory, citing *Missouri Pacific R. Co.* v. *Norwood*, 42 F. 2d 765, 773 (W. D. Ark. 1930), cert. denied 283 U. S. 249, and *In re Chicago North Shore & M. R. Co.*, 147 F. 2d 723, 727 (C. A. 7, 1945), cert. denied 325 U. S. 852, in which the phrase "working conditions" as used in the Railway Labor Act was defined as any "such conditions affecting the work of the employees as might be the subject of agreement between the carriers and the employees" (R. 12).

The District Court, in dismissing the amended complaint, held that the disputes alleged therein arose out of "the interpretation or application of [union shop] agreements concerning 'working conditions' as used in Section

3-First (i) of the Railway Labor Act" (R. 14), and that since this Section of the Act confers jurisdiction on the appropriate Division of the National Railroad Adjustment Board to hear and determine all disputes of this character, the jurisdiction of the Board is "exclusive" under the holdings of this Court in the *Pitney, Slocum* and *Southern* cases, *supra* (R. 18).

It is respectfully submitted that these issues, decided by the District Court and affirmed by the Court of Appeals, are the only questions properly before this Court on the present petition for a writ of certiorari.

2. The petitioners' claim at pages 24-26 of the petition that the District Court's decision is in conflict with *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, is completely fallacious. In the *Steele* case the collective bargaining agreement was palpably illegal because it discriminated against Negro firemen employed by the railroad company solely because of their race. Of course the courts have jurisdiction in such a case. There can be no comparison between the illegal contract in the *Steele* case, *supra,* and the perfectly legal agreements in the case at bar. As the District Court took great pains to point out in its opinion "there is not one line in the amended complaint suggesting that the collective bargaining agreements here are invalid" (R. 15). The *Pitney, Slocum* and *Southern* cases, *supra,* clearly distinguish the difference between legally binding agreements and those that are plainly illegal. This Court clearly stated that legal agreements concerned with the Railway Labor Act should be interpreted by the appropriate tribunals established by the Congress for that purpose but that the courts would be ever alert to assume jurisdiction and grant redress where an agreement was patently illegal and discriminatory.

The District Court summarized the main allegations of the amended complaint, saying that "The amended complaint further alleges that prior to June 20, 1952 [The Long Island Rail Road Company] entered into separate agreements with the Brotherhoods, railway labor organizations, relating to and controlling hours, wages and working conditions * * *; and that such agreements were, on June 20, 1952, supplemented by separate union shop agreements pursuant to the authority of Section 2-Eleventh of the Railway Labor Act; and that the various agreements constitute the respective collective bargaining agreements" between The Long Island Rail Road Company and its employees (R. 6). Later, in discussing these allegations in the amended complaint, the District Court concluded that the allegations contained therein presented a controversy arising out of the interpretation or application of agreements concerning "working conditions" (R. 14) that came within the exclusive jurisdiction of the National Railroad Adjustment Board.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Dated December 28, 1953.

Respectfully submitted,

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APPENDIX A

Railway Labor Act of 1934, as Amended 48 Stat. 1186 (1934), 45 U.S.C. §152 (1946), as amended 64 Stat. 1238 (1951) 45 U.S.C. §152 (1952 Supp.); 48 Stat. 1187 (1934), 45 U.S.C. §153 (1946)

§152. General Duties.

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

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Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of

the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden.

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements.

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * *

Eleventh. Union security agreements; check-off.

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the ef-

fective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered

in the First division of subsection (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§153. National Railroad Adjustment Board.
First. Establishment; composition; powers and duties; divisions; hearings and awards.

There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers desgnated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor

organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheetmetal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house

employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the contro-

versy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suits the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid

out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

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APPENDIX B

Memorandum Opinion of Conger, J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 79-223

UNITED RAILROAD OPERATING CRAFTS, ET AL.,
Plaintiffs-Appellants,

against

THE NEW YORK NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Defendant-Appellee,

BROTHERHOOD OF RAILROAD TRAINMEN,
Intervenor-Appellee,

and

Civ. 79-308

UNITED RAILROAD OPERATING CRAFTS, ET AL.,
Plaintiffs-Appellants,

against

WILLIAM WYER, ET AL.,
Defendants-Appellees,

BROTHERHOOD OF RAILROAD TRAINMEN,
Intervenor-Appellee.

CONGER, J.:

MEMORANDUM

Applications by the plaintiffs under Rule 60(b)(6), F.R.C.P., to vacate and set aside the orders and final judg-

ment of August 31, 1953 entered on the mandate of the Court of Appeals for the Second Circuit, and modifying the order of April 27, 1953 dismissing the amended complaints so as to permit plaintiffs to file an amendment to their amended complaints.

Rule 60(b)(6) authorizes relief from a judgment for "any other reason justifying relief from the operation of the judgment." Plaintiffs place no reliance upon subdivisions (1) to (5) of Rule 60(b).

Plaintiffs' reason for relief under Rule 60(b)(6) amounts to this: that the conclusions expressed in the opinion of the court dated April 16, 1953 (115 F. Supp. 359), as effectuated by the order of April 27, 1953 and judgment of August 31, 1953 entered on the mandate of the Court of Appeals, raise serious questions of the constitutionality of the union shop amendments to the Railway Labor Act, so that plaintiffs in view of the irreparable harm ensuing, should now be permitted to challenge these amendments in these suits. Aside from the fact that the plaintiffs have waited six months from the entry of the order dismissing the suits and four months after the affirmance by the Court of Appeals and also aside from the fact that UROC has opportunity to raise the problem in other cases pending (I am not certain, however, how this would benefit the individual plaintiffs here), the relief sought is denied because the plaintiffs could have, and should have, posed the question long prior to the order of April 27, 1953.

My opinion of April 16, 1953 with the subsequent and consequent orders entered thereon did not bring into being the constitutional issue urged here. Such issue was present and alive when plaintiffs filed their original complaints. Further the authorities cited by the defendants in their attack on the amended complaint, and adopted by the court suggested the strong possibility that the court's decision might be in accord with these authorities. The plaintiffs

may not have anticipated such result but they chose their theory of attack and now they may not adopt a new one, which certainly was within their knowledge but which they chose not to assert.

The applications are denied. *Ackerman* v. *United States,* 340 U. S. 193; *Von Wedel* v. *McGrath,* 100 F. Supp. 434; aff'd *per curiam* 194 F. (2d) 1013; See also *Klapprott* v. *United States,* 335 U. S. 601; *United States* v. *Karahalias,* 205 F. (2d) 331.

Settle Orders.

/s/ Edward A. Conger
United States District Judge

Dated: December 8, 1953